79-1293

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No.

LLOYD PLUMMER,

Petitioner,

vs.

DANIEL KLEPAK, as Chairman of the NEW YORK STATE DRUG ABUSE CONTROL COMMISSION and NEW YORK STATE DRUG ABUSE CONTROL COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In The

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October Term, 1979

No.

LLOYD PLUMMER,

Petitioner,

vs.

DANIEL KLEPAK, as Chairman of the NEW YORK STATE DRUG ABUSE CONTROL COMMISSION and NEW YORK STATE DRUG ABUSE CONTROL COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner Lloyd Plummer prays that a writ of certiorari be issued to review the final judgment of the Court of Appeals of the State of New York entered in the office of its clerk on November 27, 1979, reversing with opinion by unanimous vote the order of the New York State Supreme Court, Appellate Division, Second Judicial Department. The order of the New York State Supreme Court, Appellate Division, Second Judicial Department unanimously affirmed with opinion an order and judgment of the New York State Supreme Court, Kings County which was entered in the office of its clerk on June 12, 1978. The order and judgment of the New

York State Supreme Court, Kings County granted with opinion petitioner's application to review and annul respondent New York State Drug Abuse Control Commission's termination of his employment as a permanently employed narcotic correction officer without affording procedural due process.

OPINIONS BELOW

The Court of Appeals of the State of New York rendered an opinion written by Judge Jasen. It is reproduced as Appendix I, *infra* pp. 1a-3a. The opinion has not yet been officially reported. The Court of Appeals of the State of New York reversed the order entered June 12, 1978, by the New York State Supreme Court, Appellate Division, Second Department which affirmed the order and judgment of the New York State Supreme Court, Kings County annulling the termination of petitioner's employment as a permanently employed narcotic correction officer and directing his reinstatement with back pay and other accrued benefits and emoluments of employment which he may be entitle to receive from the date of termination of his employment. The remittitur of the Court of Appeals of the State of New York reversing the order of the New York State Supreme Court, Appellate Division, Second Department is reproduced as Appendix II, *infra*, pp. 4a-5a. The memorandum opinion and order of the New York State Supreme Court, Appellate Division, Second Department is reproduced as Appendix III, *infra*, pp. 6a-8a. The opinion is reported as *Plummer v. Klepak*, 63 A.D. 2d 983, 405 N.Y.S. 2d 767 (Second Dept. 1978). The memorandum opinion of the New York State Supreme Court, Kings County and judgment is reproduced as Appendix IV, *infra* pp. 9a-13a. The opinion was not officially reported.

JURISDICTION

The final judgment of the New York State Court of Appeals was entered on November 27, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Was petitioner deprived of a property right when his employer, the New York State Drug Abuse Control Commission, summarily terminated him by construing his unexplained absence from his position as a permanently appointed narcotic correction officer to be a resignation of employment?

2. Did the New York State Drug Abuse Control Commission deny petitioner procedural due process guaranteed under the Fourteenth Amendment to the Constitution of the United States when it failed to apprise petitioner of the availability of a procedure by which he could contest the action taken by respondent to construe his absence as a resignation from employment and additionally when it failed to comply with the established procedure applicable to the termination of employees?

3. Was petitioner's action designating a collective bargaining agent and thereafter being employed under the terms of an agreement negotiated by the State of New York and his union a waiver in the event of the termination of employment of his constitutional rights to procedural due process?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

STATEMENT OF THE CASE

The petitioner Lloyd Plummer until his termination in October 1975 by the respondent New York State Drug Abuse

Control Commission held a permanent appointment as a narcotic correction officer (R4)[1], a position within the competitive class of the classified civil service of the State of New York. Petitioner, after being so employed for over five years, was informed on October 7, 1975, that he had been considered on unauthorized leave from his employment for more than ten days and accordingly was advised in writing "that this unexplained absence constituted a resignation under both subdivision (d) of Section 5.3 of the Rules and Regulations of the Department of Civil Service . . . and article 15.10 of the collective bargaining agreement between the State and petitioner's union." (1a).[2] Subdivision d of Section 5.3 of the Rules and Regulations of the New York State Department of Civil Service is reproduced as Appendix V, *infra,* p. 14a. Article 15.10 of the collective bargaining agreement between the State of New York and petitioner's union, Council 82 of the American Federation of State, County, Municipal Employees, AFL-CIO is reproduced as Appendix VI, *infra,* p. 15a. Except for being advised that in the event of any questions, he should contact his local personnel office (R30), petitioner was not informed that there existed a procedure to contest the action taken to terminate him nor was he warned that if he failed to act within a specified period, he would waive his rights.

Both the rules and regulations of the New York State Department of Civil Service and the collective bargaining agreement (14a-15a) provided that an employee's unauthorized absence for a period greater than ten days could be construed as a resignation effective the date the leave began.

The terms and conditions of petitioner's employment as a narcotic correction officer were in part governed by a collective

1. Reference (R_) are to pages in the record in the Court of Appeals of the State of New York.

2. Reference (_a) are to pages in the appendix to this petition for a writ of certiorari.

bargaining agreement between the State of New York and his union. The agreement included among its several provisions two mutually exclusive grievance procedures. One, Article 8, specifically applicable to permanent employees, like petitioner, established a prescribed and exclusive procedure to be followed by New York State in the event of charged employee misconduct and discipline thereafter. This procedure, among other things, required service of a notice of discipline setting forth the conduct for which discipline was being imposed and the proposed penalty. It further provided that the proposed penalty could not be implemented until the period in which to file a disciplinary grievance had elapsed and in the event one had been filed until the disciplinary grievance had either been settled or otherwise concluded. An employee accused of misconduct and threatened with termination or other lesser penalty had, if he desired, pursuant to Article 8, an absolute right to a hearing before an impartial arbitrator.

The other grievance procedure, Article 7, applied to disputes pertaining to the application or interpretation of the agreement. There, unlike the disciplinary grievance procedure which would be initiated by the State serving a proper notice of discipline, the employee or his union was responsible for initiating proceedings. The latter occurred through the filing of a grievance within ten calendar days of the act or omission giving rise to the grievance or within ten calendar days of the date on which the employee first knew of such act or omission. Under Article 7 only the union or the State could invoke arbitration (R5). The employee, such as petitioner, could not proceed to arbitration in the event the union determined not to go forward. Thus, an employee contesting termination for whatever reason pursuant to the Article 7 grievance procedure did not possess an absolute right to an impartial hearing — something which existed under the Article 8 disciplinary grievance procedure.

Petitioner contested the New York State Drug Abuse Control Commission's action summarily terminating him without complying with the disciplinary grievance procedure

requiring complete notice and other aspects of procedural due process including, if requested by petitioner, a pre-termination hearing. Petitioner did this by filing a grievance under Article 7 which, however, because it was filed more than ten days after petitioner received the letter of termination, was rejected as untimely (R14-21). Petitioner in his grievance which the union refused to process to arbitration (R8), argued that the New York State Drug Abuse Control Commission's action construing his absence to be tantamount to a resignation, albeit involuntary, was disciplinary and therefore action could not be taken against him by the State without complying with the established procedure under Article 8. The New York State Drug Abuse Control Commission, relying upon the fact that petitioner had failed to file a timely grievance under Article 7, did not pass upon the merits of the grievance. His termination remained in effect.

Thereafter petitioner brought an action contesting the legality of his termination in the New York State courts. Petitioner asserted his termination was illegal because the New York State Drug Abuse Control Commission had in acting against him failed to comply with the explicit procedure established under Article 8 of the collective bargaining agreement (R8, 9) and furthermore had violated Article 14 of the United States Constitution by depriving him of a property right — the right to retain his employment as a narcotic correction officer — without complying with the basic tenets of procedural due process.

The New York State Supreme Court, Kings County and the New York State Supreme Court, Appellate Division, Second Department sustained petitioner's application (6a-13a). The court in each instance did so by relying upon the decision of the Court of Appeals of the State of New York in *Matter of Johnson v. Director, Downstate Medical Center,* 41 N.Y. 2d 1061 (1977). In the latter proceeding the court of appeals had held that the State's action applying subdivision (d) of Section 5.3 of the Rules and Regulations of the Department of Civil

Service to terminate an employee by construing his absence as a resignation was tantamount to terminating him because of misconduct and thus could not be implemented without complying with the procedural mandates of Section 75 of the New York State Civil Service Law. Therefore both the New York State Supreme Court, Kings County and the New York State Supreme Court, Appellate Division, Second Department held that petitioner could not be terminated by applying the same rule as contained in the collective bargaining agreement without first invoking the notice and hearing provisions as set forth in Article 8 of the collective bargaining agreement. The New York State Court of Appeals opinion in *Matter of Johnson v. Director, Downstate Medical Center* is reproduced as Appendix VII, *infra,* pp. 16a-18a. There the court of appeals stated in passing upon the rule as it appeared in the Rules and Regulations of the Department of Civil Service that:

> "Whatever may be its external formulation in substance this rule provides that a certain type of venial dereliction of duty, if unexplained, will authorize an employer to terminate the employment of a temporary or permanent employee. In a general sense it appears to offer a means for summary involuntary termination of employment based on nonperformance of duty. To the extent that its application may result in a discharge of the employee it may be said to parallel Section 75 in purpose. But as occurred in this instance, the employer is not required or expected to give any notice to the employee before invoking the rule. This flies in the face of one of the mandates of Section 75." (16a-17a).

The New York State Court of Appeals, despite its prior decision in *Johnson, supra,* reversed the lower courts and dismissed petitioner's application. The court in so doing relied upon the collective bargaining agreement's provision that an unauthorized absence for ten consecutive workdays would be

deemed to constitute a resignation. This it did even though it acknowledged that it was a parallel provision to what had been ruled to be discipline in *Johnson*. The court in effect held that the dispute between petitioner and his employer pertained to whether his absence constituted a resignation and that therefore his recourse was to file a timely grievance under Article 7 of the collective bargaining agreement. Since petitioner had failed to do this, he would not be able to contest his termination. The court failed to consider the constitutional implications in that by its action the State of New York had deprived petitioner of a property right and that in so doing the State had not advised petitioner of his rights to contest the termination.

The Court of Appeals of the State of New York has thus held that a permanent public employee might in the event of his absence, if his union so agreed that such was to be deemed a resignation, be summarily terminated without any semblance of procedural due process. Thus the Court of Appeals of the State of New York has in effect held that a permanent employee's constitutional rights of due process can be waived in a collective bargaining agreement by his union.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was deprived of a property right when his employer, the New York State Drug Abuse Control Commission, summarily construed his unexplained absence from his position as a permanently appointed narcotic correction officer to be a resignation of employment.

The instant case explicitly demonstrates the classic example of an employer in response to alleged employee misconduct terminating the employee. An extended discussion to show that the discipline imposed, severance of petitioner's employment, constitutes a deprivation of petitioner's property rights is not necessary.

It is uncontroverted that petitioner as a narcotic correction officer employed by the New York State Drug Abuse Control Commission held under the applicable law of the State of New York a position by permanent appointment in the competitive class of the classified civil service of that State. It is beyond cavil that pursuant to Section 75 of the New York State Civil Service Law, 9 McKinney's Cons. Laws, Section 75, as well as pursuant to the collective bargaining agreement between the State of New York and his union, petitioner's expectancy of continued employment had ripened into a protected property interest in his being retained in civil service employment. *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 593 (1972).

No matter whether the New York State Drug Abuse Control Commission's action involuntarily terminating petitioner because of his alleged unauthorized absence be labeled discipline as the New York State Court of Appeals did in the related case, *Matter of Johnson v. Director, Downstate Medical Center,* 41 N.Y. 2d 1061 (1977) or an acceptance of a resignation as the New York State Court of Appeals did here, the final result is the same. Petitioner's property interest as represented by his expectancy of continued retention in his civil service position was extinguished because his employer construed certain acts to be misconduct.

It is abundantly clear that a rule or policy which permits an employer to sever an employee's employment because of unexplained absence is nothing more than discipline resulting from employee misconduct. Indeed one need only look to the Court of Appeals of the State of New York's own decision in *Matter of Johnson v. Director, Downstate Hospital, supra,* (16a-18a), for the correct characterization of the rule relied upon to terminate petitioner. The court there stated:

> "Whatever may be its external formulation, in substance this rule provides that a certain type of venial dereliction of duty if unexplained will

> authorize an employer to terminate the employment of a temporary or permanent employee. In a general sense it appears to offer a means for summary involuntary termination of employment based on non-performance of duty." 41 N.Y. 2d at 1062. (16a-17a).

So, too, in this case the New York State Drug Abuse Control Commission's action relying upon petitioner's alleged unauthorized absence as an excuse, though labeling it a resignation, utilized a mechanism for petitioner's summary and involuntary termination of employment. The clear, undeniable result of such action was to deprive petitioner of his valued property rights in being retained in his permanently appointed civil service position — a right extended to him under the laws of the State of New York.

II.

The New York State Drug Abuse Control Commission denied petitioner procedural due process guaranteed under the Fourteenth Amendment to the Constitution of the United States when it failed to apprise petitioner of the availability of a procedure by which he could contest the action taken by respondent to construe his absence as a resignation from employment and additionally when it failed to comply with the established procedure applicable to the termination of employees and in so doing acted contrary to this Court's opinions in *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Perry v. Sindermann*, 408 U.S. 593 (1972), *Arnett v. Kennedy*, 416 U.S. 134 (1973), *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978).

Petitioner's employment with the State of New York as a narcotic correction officer was undeniably terminated upon his receipt of notification that he had been on an unauthorized leave from unemployment and that this unexplained absence constituted a resignation (1a). The State in so apprising

petitioner neither advised him of the existence of an avenue by which he might contest his termination nor informed him that if he failed to do so within a specified time frame, his rights would be waived and his employment irrevocably ended. Despite the inviolate existence under both New York statutes and the collective bargaining agreement between the State of New York and his union of an established procedure allowing for a pre-termination hearing, petitioner was summarily terminated. Finally, when he did file a grievance, it was rejected as untimely and he was held to have waived rights that he had not been specifically apprised existed.

It is beyond cavil that since petitioner could only be terminated because of misconduct, he possessed a clear property interest entitled to constitutional protection, *Arnett v. Kennedy*, 416 U.S. 134 (1973); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972), and from which he could only be deprived by some form of notice of some sort of a hearing, and that hearing. In *Arnett v. Kennedy, supra*, Mr. Justice Powell, in response to the position of the plurality that the statute governing federal employment determined not only the nature of the individual's property interest but also the extent of the procedural protections he could claim, pointed out, at 167:

> ". . . This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v.*

Burson, 402 U.S. 535 (1971); *Board of Regents v. Roth, supra; Perry v. Sindermann, supra.*"

Or, as Mr. Justice Powell put it in the Court's opinion in *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1 (1978), involving the termination of utility service by a municipally-owned utility at 9:

> "The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause. Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *Perry v. Sindermann,* 408 U.S. 593, 602 (1972)."

Although a sharp dispute has existed as to what comprises adequate notice and hearing so as to meet the requisites of constitutional due process, this Court has set forth minimal standards, the absence of which constitutes a denial thereof.

In *Arnett v. Kennedy, supra,* a majority of this Court concurred with Mr. Justice Powell's conclusion that though constitutional due process would not necessarily dictate a pre-termination evidentiary hearing, it would require an opportunity for a post removal hearing before an impartial decision-maker where the employee's claims are finally resolved. *Arnett v. Kennedy, supra,* at 170 n. 5 (Powell, J., concurring in part).

More recently and particularly pertinent to this petition, this Court in *Memphis Light Gas & Water Division v. Craft,* 436 U.S. 1 (1978) held that it was not enough that there existed an

avenue of redress to contest the deprivation of a property interest, if notification of the deprivation failed to apprise of its availability. There in an action contesting the termination of utility service by a municipally-owned utility as being without due process of law, this Court concluded that though the utility's notification procedure of termination was adequate, its failure to provide notice reasonably calculated to apprise the customer of the availability of an avenue of redress constituted a deprivation of due process. The undenied facts pertaining to petitioner's termination are just as compelling as in the denial of gas service in *Memphis Light Gas & Water Division.*

Here, there existed a grievance procedure within the framework of the collective bargaining agreement between the State of New York and petitioner's union that governed employee misconduct which included a full panoply of procedural due process starting with notification describing the conduct in question, proposed penalty and employee rights and affording the opportunity for a pre-termination hearing before an impartial arbitrator. Yet the State of New York by construing petitioner's unexplained absence, as permission to terminate him under the guise of a "voluntary resignation" completely ignored not only the established procedure but simple requisites of constitutional due process.

Petitioner before being terminated had a right to adequate notice and an impartial hearing under New York State law — this he was denied. Petitioner after being terminated had a right to adequate notice advising him of his avenue of redress and an impartial hearing under the Fourteenth Amendment to the Constitution of the United States — this, too, he was denied. Petitioner, in short, was deprived of his property right in being retained in his permanent position as a narcotic correction officer with the State of New York without receiving any semblance of procedural due process.

III.

Petitioner in designating a collective bargaining agent and thereafter being employed under the terms of an agreement negotiated by the State of New York and his union did not waive in the event of termination of employment any constitutional rights to procedural due process.

It has initially been demonstrated that petitioner's termination, albeit characterized a "voluntary resignation," deprived him of a substantial property interest from which he could only be deprived by his employer, the State of New York, adhering to constitutional standards of procedural due process. The third point questions whether petitioner's rights to procedural due process were waived by virtue of his designation of a collective bargaining agent who negotiated an agreement which included a provision deeming unauthorized absence to be a "voluntary resignation."

The thrust of the Court of Appeals of the State of New York's decision is readily apparent. Although that court previously held that when included in the Rules and Regulations of the New York State Department of Civil Service a provision construing unauthorized absence to constitute a "voluntary resignation" from service comprised discipline and therefore required compliance when terminating an employee with the established procedure of Section 75 of the New York State Civil Service Law, *Johnson v. Director, Downstate Medical Center,* 41 N.Y.2d 1061(1977)(16a-18a), a duplicate clause when contained in a collective bargaining agreement would be construed differently. The Court of Appeals of the State of New York, apparently without considering the procedural due process implications of such a determination, in essence held in the latter instance that by including the same provision with the same label in a collective bargaining agreement a permanent employee's otherwise existent right upon being terminated to procedural due process could be waived. Implicit in the court of appeal's conclusion that petitioner's failure to file a timely

grievance constituted a waiver of his right to contest termination, even though the notice advising him of his termination failed to set forth either the availability of the procedure to seek redress or its time frame, *Memphis Light, Gas & Water Division v. Craft, supra,* is that petitioner's rights to procedural due process might be waived.

Thus, the Court of Appeals of the State of New York raises an issue of significant importance of a constitutional magnitude, namely whether the property right of a permanent public employee to continued employment, otherwise existent under state law and therefore protected by constitutional standards of procedural due process, could be destroyed by a collective bargaining agreement between the State and his union. Clearly, the court of appeal's reference to the fact that the employee "having designated the union as his collective bargaining agent is bound by the terms of the agreement negotiated for and made on his behalf." (3a) means under the facts of this case nothing more. Such a conclusion is contrary to what this Court has otherwise held.

It is well established that the waiver in any context of constitutional rights must at the minimum be clear. *Fuentes v. Shevin,* 407 U.S. 67, at 95 (1972). Claims that an individual has foregone the opportunity to assert a constitutional right are scrutinized with great care. *Fuentes v. Shevin, supra; Boykin v. Alabama,* 395 U.S. 238 (1969); *Carnley v. Cochran,* 369 U.S. 506 (1962); *cf., D.H. Overmyer Co. v. Frick Co.,* 405 U.S. 174 (1972). Thus, while one might knowingly waive his constitutional rights to due process, it is inconceivable that the designation of a collective bargaining agent can be construed as the vehicle for a finding that such rights have been waived under a resulting contract.

Indeed this Court, in sharp contrast to any notion that by designating a collective bargaining agent the foundation for the waiver of constitutional rights might be established, has unanimously held that the inclusion of a non-discrimination

clause in a collective bargaining agreement and an arbitration questioning whether an employee's discharge violated such clause, did not constitute a waiver of statutory rights to a trial *de novo* under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq., Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974). The statement by this Court in referring to Title VII that:

> "Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's right under Title VII are not susceptible of prospective waiver." 415 U.S. at 51, 52,

is particularly apropos to this petition.

Here, one must conclude that the strictures of the United States Constitution with respect to procedural due process are absolute and represent a constitutional command that a permanent public employee can not be deprived of his employment without procedural due process. Such rights can form no part of the collective bargaining process since a waiver of such rights, except explicitly, would defeat the paramount purpose behind the Fourteenth Amendment to the Constitution of the United States. Nothing exists in this case that establishes an explicit waiver by petitioner in the event of termination of his constitutional rights of due process.

CONCLUSION

The instant petition for a writ of certiorari should be granted; and the final judgment of the Court of Appeals of the State of New York of November 27, 1979, reversed on the basis that petitioner's termination of employment by the State of New York was without procedural due process and therefore in violation of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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APPENDIX I — OPINION OF COURT OF APPEALS OF STATE OF NEW YORK

STATE OF NEW YORK

COURT OF APPEALS

2 No. 445

In the Matter of Lloyd Plummer,

Respondent,

vs.

Daniel Klepak, as Chairman of the New York State Drug Abuse Control Commission, & ano.,

Appellants.

(445) Robert Abrams, Attorney-General
(William J. Kogan & Shirley Adelson Siegel of counsel)
for appellant.

Joel Field, NY City, for respondent.

JASEN, J.:

Petitioner, a Narcotic Control Officer with the respondent New York State Drug Abuse Control Commission, was informed by letter dated October 7, 1975, that he had been on unauthorized leave from his employment since September 16, 1975. The letter stated further that this unexplained absence constituted a resignation under both subdivision (d) of section 5.3 of the Rules and Regulations of the Department of Civil Service (former 4 NYCRR 5.3[d] [repealed February 27, 1979]) and article 15.10 of the collective bargaining agreement between the State and petitioner's union.

Appendix I

Thereafter, on November 5, 1975, petitioner filed a grievance pursuant to article 7 of the collective bargaining agreement ("Grievance and Arbitration"). This grievance was rejected ultimately as untimely inasmuch as it had not been presented within ten days of the date petitioner first knew of his termination, as was required by the express terms of that article.

The instant proceeding was thereafter commenced pursuant to article 78 of the CPLR. Special Term held the termination was contrary to law, granted the petition and ordered respondents to reinstate petitioner to his former position, with back pay and interest retroactive to the date of his termination of employment, less compensation earned in other employment and unemployment benefits received since the date of termination, along with all emoluments of employment. The Appellate Division unanimously affirmed. There should be a reversal.

Initially, we address the conclusions reached by the Appellate Division that petitioner's resignation was disciplinary in nature and that respondents were obliged to invoke the notice and hearing procedures outlined in article 8 of the collective bargaining agreement ("Discipline"). This characterization of petitioner's termination as "disciplinary" is at variance with the terms of the collective bargaining agreement in which the parties agreed that an unauthorized and unexplained absence for ten consecutive workdays would be deemed a *resignation.* In our opinion, this dispute between the parties concerned the application of provisions of the agreement. Thus, it was incumbent upon petitioner to file a grievance within ten days of the date he first learned of his termination as mandated by article 7 of the agreement. (See *Matter of Flemming v. Cagliostro,* 53 AD2d 187, mot for lv to app den 40 NY2d 806). This, he did not do.

Since petitioner failed to avail himself of the grievance procedure set forth in the collective bargaining agreement, he is

Appendix I

precluded from seeking relief under article 78 of the CPLR. (See, e.g., *Matter of Flemming v. Cagliostro,* 53 AD2d, at p 189, *supra; Merante v. Burns,* 47 AD2d 671; see also, *Slater v. Gallman,* 38 NY2d 1.)

Petitioner, having designated the union as his collective bargaining agent, is bound by the terms of the agreement negotiated for and made on his behalf. (*Schacht v. City of New York,* 39 NY2d 28, 32.) The collective bargaining agreement expressly provides that an unauthorized absence for ten consecutive workdays would be deemed to constitute a resignation. The bargain having been struck and the parties having agreed to a procedure for the resolution of disputes involving this provision, petitioner should not now be heard to complain, having failed to avail himself of the administrative remedies outlined in the collective bargaining agreement. (See *Matter of Flemming v. Cagliostro,* 53 AD2d 187, *supra.*)

Nor is our holding today in conflict with our prior decision in *Matter of Johnson v. Director, Downstate Medical Center* (41 NY2d 1061). Although in *Johnson* we held that subdivision (d) of section 5.3 of the Rules and Regulations of the Department of Civil Service (former 4 NYCRR 5.3[d]) was invalid since its provisions were in conflict with section 75 of the Civil Service Law, we did not reach the further issue — presented by this appeal — whether a parallel provision embodied in a collective bargaining agreement would also be void.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the petition dismissed.

* * * * *

Order reversed, with costs, and the petition dismissed. Opinion by Jasen, J. All concur.

Decided November 27, 1979

APPENDIX II — REMITTITUR OF COURT OF APPEALS OF STATE OF NEW YORK

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

2 No. 445
In the Matter of Lloyd Plummer,

Respondent,

vs.

Daniel Klepak, as Chairman of the New York State Drug Abuse Control Commission, & ano.,

Appellants.

The appellant(s) in the above entitled appeal appeared by Robert Abrams, Attorney General; the respondent(s) appeared by Joel Field.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and the petition dismissed. Opinion by Jasen, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Kings County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Appendix II

s/ Joseph W. Bellacosa
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 27, 1979

APPENDIX III — OPINION OF NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

—AD2d— A - May 15, 1978

1350 In the Matter of Lloyd Plummer, respondent, v. Daniel Klepak, as Chairman of the New York State Drug Abuse Control Commission, et al., appellants.

Louis J. Lefkowitz, Attorney-General, New York, N.Y. (Emanuel M. Kay and Samuel A. Hirshowitz of counsel), for appellants.

Joel Field, New York, N.Y., for respondent.

In a proceeding pursuant to CPLR article 78 *inter alia* to compel appellants to reinstate petitioner to his former position of Narcotic Correction Officer, effective September 15, 1975, with back pay and other accrued benefits and emoluments to which he may be entitled, the appeal is from a judgment of the Supreme Court, Kings County (MONTELEONE, J.), entered September 8, 1977, which granted the petition.

Judgment affirmed, with $50 costs and disbursements.

Petitioner was employed for more than five years by the New York State Drug Abuse Control Commission as a Narcotic Correction Officer. On October 7, 1975, after a prolonged, unexplained absence, petitioner was informed by letter that he had been on unauthorized leave since September 16, 1975. The letter stated further that petitioner's unexplained absence constituted a resignation under article 15.10 of the collective bargaining agreement between the State and petitioner's union and under section 5.3 (subd. [d]) of the Rules and Regulations of the Department of Civil Service.

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On November 5, 1975 petitioner filed a grievance under article 7 ("Grievance Arbitration") of the agreement because he could not pursue the remedies provided for under article 8 ("Discipline") of the agreement. He could not do so because appellants refused to invoke the procedures by serving a notice of discipline. The grievance was subsequently denied as untimely because it was not filed within 10 days of receipt of the appellants' letter. Petitioner then brought this article 78 proceeding seeking reinstatement.

Since petitioner held a permanent civil service position, he could not be dismissed without a hearing. Accordingly, the termination of his employment was improper (see *Matter of Johnson v. Director, Downstate Med. Center,* 52 AD2d 357, affd 41 NY2d 1061; *Matter of Dain v. City Cent. School Dist. of Port Jervis,* 57 AD2d 622; *Matter of McGirr v. Division of Veterans Affairs Executive Dept., State of N.Y.,* 43 NY2d 635).

The appellants, citing *Matter of Flemming v. Cagliostro* (53 AD2d 187, mot. for lv. to app. den. 40 NY2d 806), contend that (1) petitioner is barred from relief under CPLR article 78 because of his failure to file a timely grievance contesting his termination under article 7 of the collective bargaining agreement, which provides a grievance procedure for disputes "concerning the application and/or interpretation of this Agreement", and (2) the provisions of article 15.10 of the agreement, which are substantively identical to the provisions of section 5.3 (subd. [d]) of the Rules and Regulations of the Department of Civil Service, are protected against a finding of unconstitutionality because of the existence of the grievance procedure, which procedure was absent in *Matter of Johnson v. Director, Downstate Med. Center (supra).*

In rejecting the appellants' contentions, we expressly decline to follow the Third Department's holding in *Matter of Flemming v. Cagliostro (supra).* In *Johnson* we held that since section 5.3 (subd. [d]) was essentially disciplinary in character, compliance

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with section 75 of the Civil Service Law, which specifies the applicable procedure for "Removal and other disciplinary action" was required and that section 5.3 (subd. [d]) was unconstitutional as applied to the petitioner therein. While the parties to a collective bargaining agreement may supplant the statutory procedures and remedies whereby covered public employees may challenge disciplinary action taken against them and may substitute alternate methods therefor (see *Antinore v. State of New York*, 49 AD2d 6, affd 40 NY2d 921), there is no indication that the collective bargaining agreement herein waived petitioner's due process rights. Indeed, had the appellants invoked the procedures specified in article 8 of the agreement, which by the terms of the agreement are applicable to "a claim of improper or unjust discipline against an employee", then section 5.3 (subd. [d]) of the Rules and Regulations of the Department of Civil Service and article 15.10 of the agreement would have been constitutional as applied. It is the failure of the appellants to have invoked the notice and hearing procedures of article 8 which brings this case under the rule of *Johnson*, wherein the employer also failed to utilize the notice and hearing provisions specified as the disciplinary procedure in the collective bargaining agreement. Since the appellants prevented the petitioner from utilizing the administrative remedies of article 8, this article 78 proceeding is a proper vehicle for relief.

GULOTTA, J.P., SHAPIRO, COHALAN and O'CONNOR, JJ., concur.

APPENDIX IV — MEMORANDUM OPINION AND JUDGMENT, NEW YORK STATE SUPREME COURT, KINGS COUNTY

SUPREME COURT, KINGS COUNTY
(SPECIAL TERM, PART I)

In the Matter of the Application of LLOYD PLUMMER

Petitioner

vs.

DANIEL KLEPAK, as Chairman of the New York State Drug Abuse Control Commission, et ano

Respondents

By: MONTELEONE, J.

Dated: August 10, 1977

Petitioner, in this Article 78 proceeding, seeks to review and annul the determination which resulted in his removal from the Civil Service position of Narcotic Correction Officer with the respondent New York State Drug Abuse Control Commission (DACC).

Petitioner was summarily terminated for being absent without authorization for ten or more consecutive work days. These circumstances constituted a presumption of resignation pursuant to Rule 5.3 of the State Civil Service Commission and identical language contained in petitioner's union contract.

The Court of Appeals has recently held that Rule 5.3 is in conflict with section 75 of the Civil Service Law which provides for a hearing upon notice prior to termination, and is thus ineffective (*Johnson v. Downstate Medical Center*, 41 N Y 2d 1061, affg. 52 A D 2d 357).

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In the instant case, as in *Johnson,* supra, the union contracts provide for disciplinary proceedings other than those provided for in section 75 of the Civil Service Law (see Vol. 12092 Appellate Division Records and Briefs, Case 3). In rejecting the argument that petitioner there had thus waived his rights, the Court of Appeals in *Johnson* ruled that he was entitled to the full protection of a due process hearing pursuant to section 75.

Based on the foregoing, it is the opinion of this court that the termination of this petitioner's employment was contrary to law and must be annulled.

Accordingly his petition is granted and petitioner shall be reinstated with back pay retroactive to the date of his termination less the amount of compensation earned in other employment and unemployment benefits received during the intervening period.

Settle order on notice.

s/ John Monteleone
J.S.C.

Appendix IV

At a Special Term, Part 1, of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York on the 6th day of September, 1977.

PRESENT: Honorable JOHN MONTELEONE
Justice

In the Matter of the Application of LLOYD PLUMMER,

Petitioner,

-against-

DANIEL KLEPAK, as Chairman of the New York State Drug Abuse Control Commission, NEW YORK STATE DRUG ABUSE CONTROL COMMISSION,

Respondents

FOR A JUDGMENT AND ORDER PURSUANT TO CPLR ARTICLE 78 REVIEWING AND ANNULLING RESPONDENT'S TERMINATION OF PETITIONER'S EMPLOYMENT AS A NARCOTIC CORRECTIONS OFFICER WITHOUT AFFORDING HIM DUE PROCESS BY WAY OF A HEARING BEFORE AN IMPARTIAL THIRD PERSON AND FURTHER GRANTING SUCH OTHER AND FURTHER RELIEF AS MAY BE APPROPRIATE

JUDGMENT

Index No. 25156/76

PETITIONER, LLOYD PLUMMER, by his attorney JOEL FIELD, having instituted this proceeding pursuant to Article 78 of the CPLR for an Order and Judgment reviewing

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and annulling Respondent's action in terminating his employment as a Narcotic Corrections Officer without affording petitioner a hearing and directing Respondent reinstate petitioner as a Narcotic Corrections Officer together with back pay and other emoluments of his employment from the date of the termination of his employment, and the said application having duly come on to be heard before me on the 28th day of June, 1977.

Now upon reading and filing the Notice of Petition dated December 1, 1976, the verified petition of LLOYD PLUMMER, verified December 2, 1976, with exhibits attached; the verified answer of the respondent, verified the 4th day of March 1977; the affidavit of JOEL FIELD sworn to on the 13th day of June, 1977 with exhibits attached in support of the petition; further affidavit of JOEL FIELD sworn to the 1st day of July, 1977 with exhibits attached in support of the petition; and hearing JOEL FIELD, ESQ., attorney for petitioner in support of the application; and Louis J. Lefkowitz, Attorney General of the State of New York by Emanuel Kay, attorney for respondent in opposition thereto; and due deliberation having been had thereon; and upon the memorandum decision of the Court dated August 10th, 1977, it is

ORDERED, ADJUDGED and DECREED that the petition is granted in all respects, and it is further

ORDERED, ADJUDGED and DECREED that the discontinuance of petitioner LLOYD PLUMMER's services by respondent as a Narcotic Corrections Officer was illegal and improper, and it is further

ORDERED, ADJUDGED and DECREED that petitioner LLOYD PLUMMER be reinstated to the position of Narcotic Corrections Officer with the New York State Drug Abuse Control Commission together with all back pay with interest retroactive to the date of his termination of employment less

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such compensation that may have been earned in other employment since the period of termination and unemployment benefits received during said period along with all other emoluments of employment, including but not limited to pension and seniority rights.

E N T E R :

s/
J.S.C.

APPENDIX V — SUBDIVISION D OF SECTION 5.3 OF THE RULES AND REGULATIONS OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

When an employee is absent without leave and without explanation therefor for a period of 10 work days, such absence shall be deemed to constitute a resignation effective on the date of the commencement of such absence. The failure of an employee to return to his position within ten work days following the expiration of a leave of absence, or extension thereof, without submitting an explanation therefor within such ten day period, shall constitute a resignation which, for purposes of determining eligibility for reinstatement, shall be deemed to be effective as of the date of the commencement of such leave of absence. Nothing herein shall be deemed to excuse the unauthorized absence of an employee or his failure to return to his position upon the expiration of an authorized leave of absence, and any such failure may be regarded as misconduct in an appropriate disciplinary proceeding.

APPENDIX VI — ARTICLE 15.10 OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE STATE OF NEW YORK AND COUNCIL 82 OF THE AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO

Any employee absent from work without authorization for ten consecutive workdays shall be deemed to have resigned from his position if he has not provided a satisfactory explanation for such absence on or before the eleventh workday following the commencement of such unauthorized absence.

APPENDIX VII — OPINION OF COURT OF APPEALS OF STATE OF NEW YORK, *MATTER OF JOHNSON v. DIRECTOR, DOWNSTATE MEDICAL CENTER*

APPEAL from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 1, 1976, which (1) reversed, on the law, a judgment of the Supreme Court at Special Term (Frank J. Pino, J.), entered in Kings County in a proceeding pursuant to CPLR article 78, dismissing a petition for a judgment directing petitioner's reinstatement to his civil service position of laboratory animal caretaker, (2) granted the petition, and (3) declared that section 5.3 (d) of the Rules and Regulations of the Department of Civil Service (4 NYCRR 5.3[d]), on the authority of which petitioner's purported resignation had been accepted, was unconstitutional as applied to him.

Louis J. Lefkowitz, Attorney-General (Shirley A. Siegel, Samuel A. Hirshowitz and *Jesse J. Fine* of counsel), for appellant.

William P. Volin and *Stanley Mailman* for respondent.

Per Curiam. We conclude that the portion of subdivision (d) of section 5.3 of the Rules and Regulations of the Department of Civil Service (4 NYCRR 5.3[d]) on which Downstate Medical Center relied when it terminated petitioner's employment is inconsistent with section 75 of the Civil Service Law and therefore invalid. In pertinent part the rule provides: "When an employee is absent without leave and without an explanation therefor for a period of 10 work days, such absence shall be deemed to constitute a resignation effective on the date of the commencement of such absence."

Whatever may be its external formulation, in substance this rule provides that a certain type of venial dereliction of duty, if unexplained, will authorize an employer to terminate the employment of a temporary or permanent employee. In a

general sense it appears to offer a means for summary, involuntary termination of employment based on nonperformance of duty. To the extent that its application may result in a discharge of the employee it may be said to parallel section 75 in purpose. But, as occurred in this instance, the employer is not required or expected to give any notice to the employee before invoking the rule. This flies in the face of one of the mandates of section 75.

It cannot seriously be contended that rule 5.3(d), at least as presently implemented, provides a separate and distinct procedure for termination of employment. We are informed that in practice if the employee tenders even an implausible excuse all proceedings under this rule abruptly and completely cease. Recourse is thereafter had to proceedings for removal or other disciplinary action under section 75, with its full panoply of procedural due process.

In our view the provisions of the statute preclude resort to the provisions of the rule (however vacuous it has become in practice) to terminate employment. To the extent that *Matter of Dunn v. Simon* (16 AD2d 719, mot for lv to app den 11 NY2d 646) may be read as expressing inconsistent views it is disapproved.

In the light of the disposition of the appeal on this ground we do not reach or consider the constitutional issues so vigorously presented.

Finally we note our agreement with the Appellate Division that this article 78 proceeding was instituted before the expiration of the four-month period of limitations.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Appendix VII

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur in *Per Curiam* opinion.

Order affirmed.